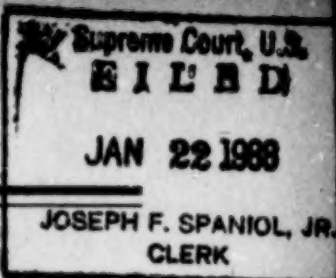


(5)
No. 87-821



**IN THE
Supreme Court of the United States
OCTOBER TERM, 1987**

Pittston Coal Group, Barnes & Tucker Company,
Island Creek Coal Company, Consolidation Coal
Company, Old Republic Insurance Company,
Pennsylvania National Insurance Group,
Petitioners,

v.

James Sebben, John Cossolotto, Bruno Lenzini,
Charles Tonelli, William Brock, III,
Secretary, United States Department of Labor,
Steven Breeskin, Deputy Commissioner,
United States Department of Labor,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

**BRIEF OF THE NATIONAL COAL ASSOCIATION
AS AMICUS CURIAE IN SUPPORT OF THE
PETITION FOR WRIT OF CERTIORARI**

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ON PETITION FOR WRIT OF CERTIORARI TO THE
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**BRIEF OF THE NATIONAL COAL ASSOCIATION
 AS AMICUS CURIAE IN SUPPORT OF THE
 PETITION FOR WRIT OF CERTIORARI**

Amicus Curiae National Coal Association respectfully
 submits that the Petition for Writ of Certiorari to review
 the judgment and opinion of the United States Court of
 Appeals for the Eighth Circuit filed in this proceeding on
 March 25, 1987 should be granted.

Pursuant to Rule 36 of the Rules of this Court, the parties to this case have by letters consented to the filing of this brief. Copies of their letters of consent have been filed with the Clerk of this Court.

INTEREST OF AMICUS CURIAE NATIONAL COAL ASSOCIATION

The National Coal Association ("NCA") is a trade association comprising approximately 325 members. NCA directly or indirectly represents over 90 percent of the nation's coal production. In addition to coal producing companies, NCA's membership includes coal brokers, equipment suppliers, coal transporters, consultants, electric utilities, and resource developers.

NCA producer members, and all other U.S. coal producers are responsible for the payment of benefits to eligible claimants under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945 (the "Act"), in two direct ways: (1) as individual coal mine operator defendants in certain black lung cases, 30 U.S.C. §§ 932-933; and (2) as mandatory payors of a producers' tax into the Black Lung Disability Trust Fund ("BLDTF"), 26 U.S.C. § 4121. The BLDTF is administered by the Secretaries of Labor, Treasury, and Health and Human Services, 26 U.S.C. § 9501(a)(2). The BLDTF is used to pay black lung compensation awards to eligible claimants whose coal mine employment ended before January 1, 1970; or in cases in which a responsible coal operator defendant cannot be identified, 26 U.S.C. § 9501(d). The BLDTF also pays the costs of the Departments of Labor, Treasury, and Health and Human Services in administering the black lung program. Those costs currently amount to over \$48 million in 1987.¹

¹ U.S. Dep't of the Treasury, *Black Lung Disability Trust Fund, Status of Funds* (Sept. 30, 1987) (available through the U.S. Treasury Department) [hereinafter cited as *1987 Trust Fund Status Report*].

Earlier this term, in *Mullins Coal Co., Inc. of Virginia v. Director, Office of Workers Compensation Programs*, 108 S. Ct. 427 (1987), this Court effectively provided black lung claim defendants with a fair opportunity to challenge the reliability of a black lung claimant's evidence at the point in the proceeding where it was relevant to do so. As a result of the *Mullins* case, it is clear that this traditional right is secured not only by the Black Lung Benefits Act, but by the invocation language of the eligibility regulation there at issue, 20 C.F.R. 727.203 (1987). Section 727.203 is the Department of Labor's "interim presumption." It was applied or was available for application in each of the thousands of cases falling within the putative class identified by the Eighth Circuit in this case. But, the Eighth Circuit holds that a different "interim presumption" promulgated by the Social Security Administration must be applied, in these cases, *i.e.*, 20 C.F.R. 410.490 (1987). While the two presumptions may produce the same result in many cases, on invocation, section 410.490, which is neither designed nor intended for application in adversarial litigation, appears to be largely irrebuttable. The Eighth Circuit's substitution of section 410.490 for section 727.203, which is difficult to rebut *but rebuttable*, effectively defeats the effect of the *Mullins* case. The Eighth Circuit's decision again precludes the seemingly fundamental premise that mine owners are entitled to a fair opportunity to defend claims in which the miner is not totally disabled due to black lung disease. The coal industry must, therefore, return to this Court to seek a restoration of these elementary rights.

ARGUMENT

THE QUESTION PRESENTED IN THE PETITION IS OF GREAT IMPORTANCE TO THE COAL MINING INDUSTRY OF THE UNITED STATES

NCA strongly supports and endorses the arguments as set forth by Petitioners², and urges the Court to grant a writ of certiorari in the instant proceeding for the following reasons.

1. Even under conditions existing prior to the Eighth Circuit opinion, the BLDTF has been chronically insolvent.

The tax paid by coal producers into the BLDTF is currently set at \$1.10 per ton on underground-mined coal and \$.55 per ton on surface-extracted coal, 26 U.S.C. §§ 4121(a), (b). The BLDTF has collected over \$3.975 billion in tonnage taxes from coal producers since 1978.³ In fiscal year 1987, the nation's coal producers paid \$572,295,000 into the BLDTF in tonnage taxes⁴.

Despite these substantial tax revenues there has been a continuing shortfall between black lung payment obliga-

² This brief is also offered in support of the Solicitor General's Petition for a Writ of Certiorari, *Whitfield v. Sebben*, petition for cert. filed, 56 U.S.L.W. 3416 (U.S. Nov. 20, 1987) (No. 87-827).

³ Staff of Joint Comm. on Taxation, 99th Cong., 2d Sess., *Summary Description of User Fees and Other Revenue Proposals in the President's Fiscal Year 1986 Budget, the Budget Resolution, and Certain Other Revenue Issues* 3 (Comm. Print 1985) [hereinafter cited as 1985 Joint Comm. on Taxation Summary]; and information supplied by James DeMarce, Associate Director for the Division of Coal Mine Workers Compensation, U.S. Dep't of Labor, in a telephone interview with Bruce Watzman, NCA (Dec. 7, 1987).

⁴ 1987 Trust Fund Status Report, *supra* note 1.

tions of the BLDTF and the income from the producers' tax. Indeed, the BLDTF has paid out over \$5.54 billion in compensation since 1978,⁵ and in fiscal year 1987, disbursed \$605 million in compensation.⁶ The massive growth in BLDTF liability is to a substantial degree attributable to the approval of approximately 120,000 previously denied claims by the Department of Labor (and to a lesser extent, the Social Security Administration) under the requirements of the Black Lung Benefits Reform Act of 1977, Pub. L. 95-239, 92 Stat. 95, (1978) including the 20 C.F.R. § 727.203 interim presumption.⁷ The approval rate greatly *exceeded* all congressional projections.⁸

⁵ See *supra* note 3. This does not include costs of administration.

⁶ 1987 Trust Fund Status Report, *supra* note 1.

⁷ Office of Workers Compensation Programs, U.S. Dep't of Labor, *Black Lung Claims Status Report* (Feb. 20, 1987) (draft) (available through the U.S. Department of Labor) [hereinafter cited as 1987 *Black Lung Claims Status Report*]. From 1978 to the present, approximately 96,000 BLDTF claims have been approved by the Department of Labor pursuant to the 20 C.F.R. § 727.203. The BLDTF is also responsible for compensation in approximately 24,000 previously-denied claims approved by the Social Security Administration under the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 [hereinafter the 1978 Amendments] and referred to the Secretary of Labor for payment from the Fund, 30 U.S.C. § 945(a)(2)(A); thus, the total number of claims that are the liability of the BLDTF because of the 1978 Amendments totals approximately 120,000. 1987 *Black Lung Claims Status Report*, *supra*.

⁸ H.R. Rep. No. 151, 95th Cong., 1st Sess. 26, reprinted in 1978 U.S. Code Cong. & Ad. News 262. Prior to the 1978 amendments and the promulgation of 20 C.F.R. § 727.203(a), fewer than 5,000 claims had been approved under Part C. See Lopatto, *The Federal Black Lung Program: A 1983 Primer*, 85 W. Va. L. Rev. 677, 691 (1983), citing Staff of Subcomm. on Oversight, House Comm. on Ways and Means, *Background Information for Hearings on the Insolvency Problems of the Black Lung Disability Trust Fund* 97th Cong. 1st Sess. 23 (Comm. Print 1981).

2. This insolvency has led to a substantial increase in coal industry tax liability to stabilize the BLDTF.

To try to meet the shortfall between compensation levels and BLDTF revenue, the producers' tax has been increased twice from the 1978 rate of \$.50 per ton on underground coal and \$.25 per ton on surface-mined coal.⁹ In 1981, the tax was increased 100% to \$1.00 per ton (underground) and \$.50 per ton (surface).¹⁰ In 1985, The Administration proposed to again raise the tax, this time by 50%. Congress, however, acknowledging the coal industry was in financial difficulty and should not be saddled with added black lung taxes, enacted only a 10% tax increase to reach the current levels of \$1.10 per ton (underground) and \$.55 per ton (surface).¹¹

In addition to the two tax increases, the BLDTF has been augmented by appropriations from the general treasury each year since its inception in 1978. These advances must be repaid by the BLDTF to the general treasury, with interest. 26 U.S.C. §§ 9501(c), (d)(4)¹². The present cumulative debt of the BLDTF in unpaid ad-

⁹ Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, § 2(a) § 92 Stat. 11 (1978).

¹⁰ Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, § 102(a), 95 Stat. 1635 (1981).

¹¹ See remarks of Senators Heinz and Warner, 131 Cong. Rec. S15,477-79 (daily ed. Nov. 14, 1985). Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203(a), 100 Stat. 312 (1986) [hereinafter cited as 1986 BLDTF Amendment]. 26 U.S.C. §§ 4121(a), (b).

¹² The 1986 BLDTF Amendment placed a five-year moratorium on interest accruals with respect to advances to the BLDTF, Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203(b), 100 Stat. 312 (Apr. 7, 1986).

vances and interest is approximately \$2.948 billion, of which \$1.032 billion is interest on advances as accumulated.¹³

Under a 1981 amendment to the Internal Revenue Code¹⁴, the producers' tonnage tax was to revert to the lower 1978 rate by January 1, 1996, or when there was neither a balance of repayable advances nor interest owed by the BLDTF, whichever date was earlier.¹⁵ However, even before the Eighth Circuit decision, the ability of the BLDTF to achieve solvency by 1996 was dubious.¹⁶ When the Administration attempted to increase the tax by fifty percent in 1985, the Department of Labor predicted that the advance and interest necessary to meet BLDTF obligations could reach \$30 billion by the year 2010. H.R. Rep. No. 241, 99th Cong., 2d Sess., pt. 1 at 75-76, reprinted in 1986 U.S. Code Cong. & Ad. News 653-54. Congress, in 1987, recognized the inability of the Trust Fund to meet its obligations. Although it rejected the President's proposal in his Fiscal Year 1988 Federal Budget to increase the tax on producers to raise \$400 million in additional

¹³ See *supra* note 3.

¹⁴ Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119 § 102(a), 95 Stat. 1635 (1981).

¹⁵ 26 U.S.C. § 4121(e), as amended by the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203(c), 100 Stat. 313 (Apr. 7, 1986) (prior to amendment of Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 99-203 § 10503 (Dec. 22, 1987)).

¹⁶ 1985 Joint Committee on Taxation Summary *supra* note 3; and based on information supplied by James DeMarce, Associate Director for the Division of Coal Mine Workers Compensation, U.S. Department of Labor, in a telephone interview with Bruce Watzman, NCA (Sept. 26, 1986).

revenues,¹⁷ it still imposed an additional burden on producers.

Congress extended the date by which the producers' tonnage tax is to revert to the lower 1978 rate by an additional 18 years, *i.e.*, until January 1, 2014.¹⁸

3. The Eighth Circuit's decision could severely exacerbate the financial difficulties of the BLDTF in a way NCA believes Congress did not intend.

The chronic insolvency of the BLDTF arises as a result of the exceptionally generous entitlement formula contained in the Department of Labor's interim presumption, *i.e.*, section 727.203. Coal tax increases and the executive branch's requests to Congress for still larger increases arise solely within this context. None of the proposals were generated by any expectation or belief that the BLDTF needed revenues sufficient to pay Department of Labor claims under the eligibility rules of section 410.490.

The Eighth Circuit's decision will, to a fairly high degree of certainty, exacerbate the financial difficulties of the BLDTF well beyond the coal industry's ability to respond. It will also add significantly to the direct liability of individual mine owners. These circumstances arise, in NCA's view, on the premise reflected in the Eighth Circuit's decision, that these statutory benefits should be

¹⁷ Executive Office of the President, Office of Management and Budget, *Budget of the U.S. Government, Fiscal Year 1988*, at 2-41. If enacted, this revenue proposal would have meant an increase of the tax to approximately \$1.75 per ton on underground coal and \$.88 per ton on surface-mined coal.

¹⁸ Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 99-203 § 10503 (Dec. 22, 1987), *amending* 26 U.S.C. § 4121(e)(2).

available whether or not the miner really has black lung disease or is disabled for work as a result of the disease. NCA does not believe that Congress intended this result, that the Eighth Circuit was correct in reaching it, or that this incorrectly perceived intent is properly applied retroactively in cases which were litigated and closed long ago.

Tens of thousands of claims meaning billions of dollars in liability could arise from the certified class.¹⁹ At this level black lung disability is essentially unfunded for the insured and self-insured coal producer as well as for the BLDTF.

As with the first review of pending and denied claims after the 1978 amendments, the lion's share of the burden resulting this case will borne by the BLDTF. A Department of Labor claims examiner's approval of a claim to be paid from the BLDTF is effectively *the last word as no third party can challenge the approval administratively or before a federal court.*

Increased revenues will thus be needed at a time when the BLDTF is already in an exceedingly precarious financial state, *and* when the Congress has acknowledged that the coal industry should not be burdened with further new black lung taxes. The Eighth Circuit's decision will not only impede the return of the producer's tax to a lower level,

¹⁹ Both the Solicitor General in his Petition for a Writ of Certiorari at 11, *Whitfield v. Sebben*, petition for cert. filed, 56 U.S.L.W. 3416 (U.S. Nov. 20, 1987) (No. 87-827) and Petitioners in the instant case, in their Petition for a Writ of Certiorari at 3, *Pittston Coal Group v. Sebben*, petition for cert. filed, 56 U.S.L.W. 3416 (U.S. Nov. 20, 1987) (No. 87-821) suggest a figure of approximately 94,000 closed claims. This estimate does not take into consideration pending claims. Petitioners in the instant case estimate between \$4.7 billion and \$13.6 billion in indemnity benefits as a result. *Id.* at 19.

and most likely contribute to a perpetual BLDTF deficit requiring additional Treasury advances and concomitant tax increases.

CONCLUSION

The Eighth Circuit's decision below is wrong for the reasons set forth in Petitioners' Brief and would impose substantial unwarranted burdens on the coal industry. Therefore, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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